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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 868

UNITED STATES OF AMERICA, PETITIONER

v.

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, NICHOLAS NOLE AND JOHN NOLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on March 4, 1940, reversing the convictions of the respondents in the District Court of the United States for the Northern District of New York.

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 234–239) is reported in 109 F. (2d) 579.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the convictions of the respondents was entered March 4, 1940 (R. 241–242).[1] The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether one who sells materials with knowledge that such materials will be used in the production of illicit distilled spirits pursuant to a conspiracy to violate the internal revenue laws may properly be convicted as a coconspirator.

STATUTE INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

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[1] In addition to the respondents, three other defendants appealed to the Circuit Court of Appeals. Their convictions were affirmed by that court (R. 242). One of them filed a petition for a rehearing (R. 239) which was denied (R. 242).

STATEMENT

On October 26, 1938 (R. 18), the respondents were indicted, with sixty-three other defendants, in the District Court for the Northern District of New York. The indictment, in one count, charged a conspiracy to violate the internal revenue liquor laws through the operation of illicit stills. Twenty-five overt acts were alleged (R. 7–16).

At the conclusion of the Government's case and again at the conclusion of the entire case the respondents moved to dismiss the indictment on the ground that the evidence was insufficient to establish a case against them. These motions were denied and exceptions taken (R. 77–85, 102–104). Of the twenty-four defendants on trial, the respondents and sixteen other defendants were convicted (R. 189).

The following sentences were imposed upon the respondents: Salvatore Falcone, one year and five months' imprisonment and a $6,000 fine (R. 117); Joseph Falcone, two years' imprisonment and a $7,500 fine (R. 117); Henry Alberico, one year and one day's imprisonment and a $3,000 fine (R. 117); Nicholas Nole, two years' imprisonment (R. 118); and John Nole, one year and five months' imprisonment and a $2,000 fine (R. 118). On appeal by the respondents and three other defendants to the Circuit Court of Appeals for the Second Circuit, that court reversed the convictions of the

respondents and affirmed the convictions of the other defendants (R. 241–242).

For the purposes of this petition the evidence is sufficiently summarized in the opinion of the Circuit Court of Appeals (R. 234–236, 237). This summary discloses that during the years 1937 and 1938 some twenty-two illicit stills were being operated in and around the City of Utica, New York; that these stills were in each case operated after the same pattern; and that the appellants in the Circuit Court of Appeals were divisible into two groups: a group of three who were the actual distillers, and a second group consisting of the respondents, who supplied the illicit distillers with sugar, yeast and cans. The Circuit Court of Appeals found that there was ample evidence as to the guilt of the still operators, but after reviewing the evidence in some detail with reference to each of the five respondents, concluded that the Government did not make out a case against any of them. While the court assumed for the purpose of its decision that the evidence was sufficient to establish that Salvatore and Joseph Falcone had knowledge that their customers were supplying the illicit distillers with the sugar sold by the Falcones (although the court expressed some doubt that Salvatore Falcone knew of the eventual destination of the sugar) and while the court also assumed that the evidence was sufficient to establish that Alberico and John and Nicholas Nole had knowledge that the persons to

whom they sold sugar, yeast and cans were the operators of illicit stills (R. 235–236),[2] it held as a matter of law that "the seller of goods, in themselves innocent, [does not become] a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime." (R. 236.) It stated that in order to hold a defendant criminally responsible as a conspirator or abettor "he must in some sense promote [the illegal] venture himself, make it his own, have a stake in its outcome," and that selling to illicit distillers with knowledge is "*toto coelo* different from joining with them in running the stills" (R. 237).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding, as a matter of law, that one who sells materials with knowledge that such materials will be used in the production of illicit distilled spirits pursuant to a conspiracy to violate the in-

[2] In view of these assumptions by the Circuit Court of Appeals as to the knowledge of the respondents there is, of course, no occasion to review the evidence for the purpose of determining whether it established that the various respondents, in fact, had knowledge. If the rule of law enunciated by the court below is incorrect, as the Government contends, the case should be remanded to that court for a determination by it of the sufficiency of the evidence to establish the knowledge of each respondent.

ternal revenue laws may not properly be convicted as a coconspirator.

2. In holding, as a matter of law, that one who sells materials with knowledge that they will be used in the operation of illicit stills pursuant to a conspiracy is not criminally responsible as a coconspirator unless he otherwise promotes the unlawful venture by joining in the operation of the stills, by making the venture his own, or by having a stake in its outcome.

3. In holding that the conviction of the respondents as members of the conspiracy charged in the indictment was improper.

4. In reversing, as to respondents, the judgments of conviction in the District Court.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals in its opinion (R. 236) expressly recognized that its decision was in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in *Pattis* v. *United States,* 17 F. (2d) 562, certiorari denied, 274 U. S. 750, *Vukich* v. *United States,* 28 F. (2d) 666, certiorari denied, 279 U. S. 847, and *Borgia* v. *United States,* 78 F. (2d) 550, certiorari denied, 296 U. S. 615; the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Anstess* v. *United States,* 22 F. (2d) 594, and *Hubinger Co.* [*Zito*] v. *United States,* 64 F. (2d) 772; and the decision of the Circuit Court of Appeals for the Sixth Circuit

in *Rudner* v. *United States*, 281 Fed. 516, certiorari denied, 260 U. S. 734. The court deemed its decision to be supported by the decision of the Circuit Court of Appeals for the Fifth Circuit in *Young* v. *United States*, 48 F. (2d) 26 (R. 236).

The decision of the court below appears also to be in conflict with those decisions holding that a lessor may be held as an accessory or a conspirator if he fails to evict a lessee after he has acquired knowledge that the lessee is using the leased premises for the operation of illicit stills or the illegal sale of liquor. *Reynolds* v. *United States*, 282 Fed. 256 (C. C. A. 6th); *Steir* v. *United States*, 2 F. (2d) 149 (C. C. A. 1st); *Brady* v. *United States*, 41 F. (2d) 449 (C. C. A. 7th); *Cardinal* v. *United States*, 50 F. (2d) 166 (C. C. A. 8th). Compare the contrary holding of the court below in *United States* v. *Dellaro*, 99 F. (2d) 781.

2. The question of law presented by the decision below obviously should be settled by this Court. In addition to its bearing upon the general law of conspiracy, it is of particular importance to the Government in the enforcement of the internal revenue liquor statutes. Plainly, one of the most effective methods of combating the production of illicit liquors is to strike, when possible, at those who supply the distiller with the necessary materials. But if the decision of the court below and that of the Circuit Court of Appeals for the Fifth Circuit of similar import, heretofore referred to, are per-

mitted to stand, the result will be that in those circuits a person may, with impunity, knowingly act as a source of supply for illicit distillers so long as his activities go no further.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

APRIL 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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